STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of WILLIAM M. DAVIDSON and the WMD FAMILY TRUST.

KAREN W. DAVIDSON, as Trustee and Income Beneficiary,

Appellant,

v

PERSONAL REPRESENTATIVES OF THE ESTATE OF WILLIAM M. DAVIDSON, ETHAN D. DAVIDSON, MARLA JANE DAVIDSON-KARIMIPOUR, JONATHAN S. AARON, as Trustee, ERIC L. GARBER, as Trustee, and the WILLIAM DAVIDSON FOUNDATION,

Appellees.

UNPUBLISHED
September 17, 2013

No. 306539
Oakland Probate Court
LC No. 2009-322394-DE

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Appellant Karen W. Davidson appeals as of right the probate court's order regarding appellant's objections to a petition filed by appellees, co-personal representatives Jonathan S. Aaron and Eric L. Garber (PRs), seeking to allow a second account relative to the William M. Davidson Estate (the estate). The order also encompassed the PRs' motion to dismiss the objections. The objections included appellant's request to have conditions placed on certain estate distributions, which the probate court rejected, and appellant has not appealed that determination. The only aspect of the order being appealed is a provision regarding tax apportionment and the abatement of bequests that established priorities with respect to the sources to be used to satisfy speculative and unknown future tax obligations arising out of the death of William M. Davidson (the decedent). We vacate that priority provision in the order and remand for further proceedings.

The decedent died on March 6, 2009, leaving behind a multi-billion dollar estate. Appellant was the decedent's wife at the time of his death. One week before his death, on March 6, 2009, the decedent executed the Last Will and Testament of William M. Davidson (the will),

nominating Aaron and Garber as the PRs of the estate. The will, as contained in its first two articles, provided for a "specific" bequest of certain assets to the "Ranch Trust." Article III of the will also included a "specific" bequest to appellee William Davidson Foundation (the foundation) of annuity payments under two separate irrevocable grantor-retained annuity trusts (GRATs), which were funded with stock in Guardian Industries, Inc.[1] With respect to both GRATs, which were established in January 2009, they had five-year annuity terms, the decedent was the initial annuitant, the estate was the successor annuitant, Aaron was the trustee, and, upon termination of the five-year terms, any undistributed GRAT property was to be passed to the foundation in light of the decedent's death prior to termination and his exercise of a testamentary power of appointment relative to the stock GRAT.[2]

With respect to the estate's "residuary" addressed in article V of the will, it was to be distributed to the William M. Davidson Trust Dated September 24, 2008, As Amended (the pour-over trust). Appellees Aaron and Garber are the current co-trustees of the pour-over trust, having succeeded the decedent upon his death. Articles V through VIII of the pour-over trust itself provided for the separate distribution of specifically bequeathed assets (SBAs) to the WMD Family Revocable Trust, as Amended and Restated on March 7, 2006 (family trust),[3] and to various family members and/or their trusts. The family trust was structured as a qualifying terminable interest property (QTIP) trust, pursuant to which a surviving spouse receives income for life and qualifies for the marital deduction under 26 USC 2056.[4] Appellant is the trustee of the family trust, and she is also an SBA beneficiary in her individual capacity. The SBAs passed to the pour-over trust by way of the will upon the decedent's death and, according to appellant, through *inter vivos* transfers.[5]

In article VII of the will, which addressed taxes and other expenses of administration, there are two provisions, §§ C and G, that effectively covered gift taxes, Generation-Skipping

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[1] The GRATs were titled the William M. Davidson Stock GRAT and the William M. Davidson Magnifying Glass GRAT.

[2] Under the GRATs, the trustee was directed to pay each annuity amount no later than 105 days after the anniversary date. Pursuant to the will, the GRAT annuity payments were to be paid to the foundation "as soon as practicable upon receipt by [the] estate but in no event later than the end of the calendar year in which received."

[3] For purposes of this opinion, and consistent with the nomenclature used by the parties, we shall continue to refer to this trust as the family trust, even though technically it became the marital trust upon the decedent's death.

[4] Contrary to the parties' conclusion, the family trust was part of the lower court record, having been attached to appellant's position statement on the PRs' petition for limited supervision.

[5] The designated distributions to the family trust included equitable interests in "Included Entities," which encompassed the Detroit Pistons Basketball Company, Full Court, L.L.C., Jamaica Bay West Associates, Ltd., Orbotech, Ltd., Palace Sports & Entertainment, Inc., and D. Management Group, L.L.C.

Transfer (GST) taxes, and estate taxes (collectively referred to as "transfer taxes").[6] These provisions both stated that the taxes "shall be paid from trust property of the Pour Over Trust other than (i) Specifically Bequeathed Assets [SBAs] or (ii) the income from Specifically Bequeathed Assets [SBAs]." The pour-over trust incorporated by reference the will's provisions regarding the payment of transfer taxes. If, after distribution of the SBAs and the payment of transfer taxes and administrative expenses, any pour-over trust residue remains, it is to be distributed to the foundation. Article VII, § E, of the will provided for a waiver of any right of recovery for taxes incurred by the estate as it pertained to distributions of the SBAs, the ranch-related assets, and any property under the gift trusts, which included the two GRATs pursuant to the definition section of the will. Finally, article VII, § B, of the will indicated that the will was to govern and direct the apportionment of all transfer taxes, overriding the statutory apportionment provisions under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*.

On March 30, 2009, the nominated PRs filed in the probate court an application for informal probate, for appointment of personal representatives, and for admission of the will. On that same date, the will was admitted to informal probate, Aaron and Garber were appointed the PRs, and letters of authority were issued to them. Pursuant to an order entered on August 12, 2009, the probate court granted a petition for limited supervision of the estate, formally admitted the will to probate, determined the heirs, which included appellant, and confirmed Aaron and Garber as the PRs.

On May 4, 2010, the PRs filed a petition for allowance of the initial account covering the period of March 13, 2009, until December 31, 2009. While that petition remained pending, on October 26, 2010, the PRs, pursuant to a settlement agreement with appellant executed four days earlier, filed an agreed-upon petition for appointment of appellant as special personal representative to administer the SBAs designated for distribution to the family trust.[7] On November 12, 2010, the probate court entered an order appointing appellant as special personal representative with respect to those SBAs. Appellant accepted the appointment and was issued letters of authority. On December 30, 2010, the probate court issued an order allowing the initial account of the PRs. On March 30, 2011, the probate court authorized appellant's distribution of the SBAs encompassed by the order that had appointed her special personal representative. Under the order, the assets were to be transferred from the pour-over trust to appellant as trustee of the family trust "in complete satisfaction" of the bequest to the family trust as set forth in the pour-over trust. The order also terminated appellant's appointment as special personal representative. On March 31, 2011, appellant and the PRs executed a distribution release and

[6] See 26 USC 2001 *et seq*. (estate tax); 26 USC 2501 *et seq*. (gift tax); and 26 USC 2601 *et seq*. (GST tax).

[7] For purposes of resolving this appeal, it is unnecessary for us to explore the reasons behind appellant's stint as a special personal representative.

indemnification agreement relative to the acts and assets associated with appellant's term as a special personal representative.[8]

On May 17, 2011, the PRs filed a petition for allowance of the second account, which covered the period of January 1, 2010, through December 31, 2010. The attached second account reflected that millions of dollars and thousands of shares of stock from the GRATs had been distributed by the PRs to the foundation in 2010 as required by the will. On June 30, 2011, the appellant filed objections to the petition to allow the second account. As relevant here, paragraph 11 of the objections prayed that the probate court not approve the second account absent the imposition of conditions on the estate's distribution of GRAT payments and assets to the foundation. Appellant sought a freeze on GRAT distributions to the foundation unless the foundation agreed to escrow or hold all distributions from the GRATs until receipt of all appropriate tax clearances. Appellant asked the probate court to condition GRAT distributions on the foundation's execution of an indemnity agreement, a return and release agreement, an escrow agreement, and/or a private settlement agreement between the estate and foundation.

The PRs filed a motion to dismiss the objections, presenting myriad arguments, and the foundation also challenged appellant's request for conditions, arguing that there was no authority granted under the will or the GRATs to impose conditions. The foundation also contended that "the payments from the GRATs cannot be used, under any circumstances, to pay federal estate tax liabilities," given the language in the will mandating the payment of transfer taxes from assets in the pour-over trust, and considering that the GRAT payments do not flow through the pour-over trust. Appellant proceeded to file a brief in response to the motion to dismiss her objections. She argued that the decedent's intent was to first care for his family by way of the family trust, giving a priority to them above the foundation. Appellant stated that the issue concerning the placement of conditions on GRAT payments to the foundation would continue to arise under the five-year annuity terms if the transfer tax matter with the IRS was not settled or adjudicated. She contended, and no one disputed, that the residue of the pour-over trust was to be used first in paying the transfer taxes. But appellant also argued that if the assets in the pour-over trust, minus the SBAs, were ultimately inadequate to pay the transfer taxes, the foundation's assets, i.e., the GRAT payments and not the SBAs, would be next in line to satisfy the transfer tax liabilities. Appellant further asserted that only if the foundation's assets were inadequate to cover the remaining transfer taxes would the assets of the family trust and other SBAs become subject for use to pay the transfer taxes. Appellant demanded that the PRs condition the GRAT payments in order to protect the family trust and its beneficiaries "against potential transfer tax liability for which the Foundation is the proper source of payment." She further contended that the will barred entirely the satisfaction of tax obligations from the family trust or SBAs in light of the language in the will which stated that transfer taxes were to be paid from the pour-over trust "other than (i) . . . [SBAs] or (ii) the income from . . . [SBAs]."

[8] Subsequently, on August 17, 2011, the probate court entered an order allowing the first and final account of appellant as special personal representative.

In reply to appellant's brief, the PRs first noted that no transfer taxes had yet been assessed and that there was no evidence that the residue of the pour-over trust would be insufficient to cover the taxes; therefore, there was no basis to impose conditions on the GRAT payments. They additionally argued that, contrary to appellant's assertion, the SBAs distributed or scheduled to be distributed to her and the family trust under the terms of the pour-over trust are to be charged with transfer taxes and abate ahead of the specific GRAT assets designated for distribution by the estate to the foundation. The PRs indicated that the will failed to address apportionment or abatement if the pour-over trust held insufficient assets to cover the transfer taxes. Therefore, according to the PRs, EPIC was implicated, specifically MCL 700.3902, which states that, unless otherwise indicated in a will or unless contrary to the testator's testamentary plan, a distributee's share abates in the following order: property that is not disposed of in the will; a residuary devise; a general devise; and a specific devise. The PRs also briefly referenced MCL 700.3920, which addresses the apportionment of estate, inheritance, or other death taxes and also has provisions that first make residuary property subject for use to pay taxes before specific bequests. The PRs contended that the GRAT bequest was a specific devise under the will, while, on the other hand, the SBAs flowed out of the pour-over trust, not the will itself, and the pour-over trust was a residuary devise under the will. Thus, transfer taxes must first be paid from the SBAs before the foundation's GRAT-related assets. On August 16, 2011, the probate court conducted a lengthy hearing on appellant's objections to the second account and the motion to dismiss the objections. The probate court ruled from the bench, and after an objection was subsequently made to a proposed order regarding the nature of the court's ruling, with a hearing on the objection being held on September 14, 2011, an order was finally entered on September 22, 2011. The order provided that appellant was an "interested person" under EPIC and the probate court rules, that the appellant's request to place conditions on distributions of GRAT assets and payments from the estate to the foundation was denied, and that the objection to the GRAT distribution in 2010 as reported in the second account was dismissed. The probate court further ruled that the PRs "need not impose conditions" on annuity payments to the foundation in the future after receipt by the estate from the GRATs. Similarly, the order also provided that the PRs "may pay the annuity payments" to the foundation "without conditions." Finally, and this is the provision in dispute in this appeal, the probate court ruled that should the assets in the pour-over trust, not including the SBAs, be insufficient to pay the transfer taxes, those taxes "shall be paid from the [SBAs] *before* they are paid from annuity payments received by the Estate from the . . . GRATs, and the annuity payments from the . . . GRATs shall be the last source of payment of these taxes[.]" (Emphasis in original.)

This appeal concerns appellant's claim that the probate court erred in reaching the issue of priority as between the GRAT assets, designated for distribution to the foundation, and the SBAs, designated for distribution to family members and the family trust, relative to their use to satisfy yet-to-be-determined tax obligations. Additionally, this appeal regards appellant's claim that, assuming it was proper for the probate court to address the issue of priority, the court substantively erred in ruling that the SBAs were to be used ahead of the GRAT assets to pay taxes.

Appellant argues that the issue of priority with respect to tax allocation was not ripe for review by the probate court, that the court's priority ruling violated the due process right to proper notice relative to SBA recipients aside from appellant and the family trust, that the probate court failed to properly interpret the will and trust documents in regard to the decedent's

intent, that the court misconstrued and misapplied EPIC, and that other legal errors were made by the court. A trial court's ruling concerning the doctrine of ripeness is subject to de novo review. *City of Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008). We also review de novo the issue regarding whether a person's constitutional right to due process was violated. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013). Although a probate court's factual findings are reviewed for clear error, this Court reviews de novo the probate court's interpretation of a will or construction of a trust. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009); *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). A probate court's interpretation of EPIC involves a question of law that is reviewed de novo. *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010). Questions of law in general are reviewed de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

We dispose of this appeal on procedural grounds. We begin by noting some preliminary observations in support of our holding. First, on review of the order being appealed and the transcripts of the hearings conducted on August 16 and September 14, 2011, wherein the probate court indicated the reasoning behind its rulings, we find it near impossible to discern whether the court based its ruling rejecting conditions on the tax priority arguments of the parties, or whether the court entirely bifurcated its analysis and decided the issue of conditions absent any connection to or relationship with its ruling on priority. As we view it, tax priority formed the basis, in part, of the parties' arguments on the issue concerning the imposition of conditions; priority was not an independent issue standing by itself. Furthermore, we cannot ascertain from the record, and the parties take contradictory positions, regarding whether the probate court rendered its priority decision solely on the basis of the decedent's intent as gleaned from the will and other estate planning instruments or whether the court employed the default provisions from EPIC. The lack of clarity in regard to the probate court's ruling is alone sufficient reason to remand this case.

Additionally, given the procedural posture of this case in which estate matters are ongoing and will continue to be addressed by the probate court until formal closure of the estate, the court has the authority to revisit the priority ruling after taxes are finalized, assuming the inadequacy of the pour-over trust's residue, at which stage there would be more certainty about all of the highly-complex tax ramifications. Indeed, it would appear that even if this Court affirmed or reversed the probate court's substantive tax priority ruling, the probate court could always revisit the priority issue down the road after taxes are finalized if unforeseen tax consequences and new facts come to light.[9] We recognize that the PRs and the foundation adamantly maintain that this case entails the simple construction of the will and that nothing that occurs in the future relative to a final tax determination would alter the analysis. We question the general proposition that future events would have no relevancy to priority. For example,

[9] A change in facts would preclude application of the law of the case doctrine, thereby allowing the probate court to reexamine the matter in the future regardless of our ruling. See *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002) (law of the case "doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law").

assuming we were to substantively hold that the GRAT assets had to be used before the SBAs to satisfy outstanding transfer taxes, a future determination that the family trust did not qualify for the marital deduction would seemingly negate our ruling, at least in part, by effectively placing family trust SBAs ahead of the GRATs for use in satisfying tax liabilities. This is because article VII, § F, of the will provides that if the family trust does not qualify for the marital deduction, "then a portion of the Estate Taxes *shall* be attributed to and apportioned against the . . . Family Trust." (Emphasis added.) Perhaps there is no future event that would comparably alter a substantive ruling in favor of the foundation, although appellant sets forth various scenarios that purportedly would impact priority in her favor. Regardless, for the reasons discussed below, we would rule similarly even assuming no final tax determinations could impact the priority ruling.

Furthermore, we note the shifting and inconsistencies of the positions held by all the parties in this case. Contrary to appellant's argument on appeal, it extensively and adamantly argued the tax priority issue below, in its lower court brief and at oral argument, and only after the court had made its ruling did appellant interject with ripeness and due process arguments.[10] Indeed, if the SBAs were next in priority to satisfy tax obligations before the GRATs, a request for conditions on GRAT distributions to protect the SBAs, as argued by appellant, would have seemingly been nonsensical. Thus, priority was a necessary component of appellant's argument on conditions, and she clearly desired a favorable ruling on priority. The PRs initially argued, essentially, that the issue of conditions was unripe for adjudication because no transfer taxes had yet been assessed and the pour-over trust's residue might be sufficient to cover the taxes.[11] Ultimately, the doctrine of ripeness may not be waived by the parties. *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 371-372; 716 NW2d 561 (2006), overruled in part on other grounds *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

In *LaFontaine Saline, Inc v Chrysler Group, LLC*, 298 Mich App 576, 589; 828 NW2d 446 (2012), this Court, explaining the doctrine of ripeness, stated:

> The doctrine of ripeness focuses on the timing of an action and is "designed to prevent the adjudication of hypothetical or contingent claims before

[10] Appellant argues that she "did not rely upon, or even argue, abatement and apportionment." During arguments to the probate court, appellant's counsel stated, "Because what it [the will] does is it changes both the abatement and the apportionment priorities and puts the [SBAs] at the end, because it's clearly [the decedent's] intent that those assets not be used to pay taxes."

[11] In the PRs' lower court reply brief to appellant's response to the motion to dismiss, they made the following observations: "[t]he mere possibility that the IRS might commence an action against [appellant] for payment of Transfer Taxes is hypothetical[;]" the probate court should disregard "the ridiculously attenuated, hypothetical nature of [appellant's] argument[;]" and "no Transfer Taxes have been paid during the accounting period, and there is no evidence that the residuary property of the Pour Over Trust will be insufficient to pay the Transfer Taxes." While the term "ripeness" was not expressly used, the concept effectively conveyed by the PRs to the probate court was that appellant's request for conditions was not ripe for adjudication, which would necessarily make any underlying priority question equally unripe.

> an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." When considering whether courts may properly exercise judicial power to decide an issue, "the most critical element" is the "requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute." [Citations omitted.]

The doctrine of ripeness assesses a pending claim "for the presence of an actual or imminent injury in fact." *Mich Chiropractic Council*, 475 Mich at 378. A claim is not ripe when the harm asserted has not sufficiently matured to warrant judicial intervention. *Id.* at 381.

The question of ripeness needs to be examined within the context of appellant's request to have conditions placed on the estate's distribution of GRAT assets to the foundation. Given the millions of dollars involved in the 2010 GRAT distribution to the foundation and the distributions scheduled thereafter, and considering the potential problems with the estate's ability to recover any distributed GRAT assets (waiver of right of recovery), the issue regarding whether conditions should be imposed on distributions to the foundation was ripe for decision by the probate court. The benefit of hindsight lacking, judicial intervention was warranted at the time. Viewing the matter more broadly, the objections to the second account, which encompassed the issue of conditions, were most certainly ripe for review, with resolution being absolutely necessary. Because of its direct bearing on and relevancy to appellant's request to make the GRAT distributions conditional, which request was ripe for review, as well as its impact on a standing dispute relative to whether appellant was an "interested person," the tax priority issue was necessarily ripe for a tentative decision by the probate court. The probate court's decision regarding priority was comparable or akin to a ruling in a declaratory judgment action. In association with the issue of priority, *and in the context of appellant's request for conditions*, the parties had adverse interests necessitating the sharpening of the issue raised, regardless of the fact that actual injuries or losses had not occurred. See *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012) (an "actual controversy" under MCR 2.605 exists when a declaratory judgment is necessary to guide or direct future conduct even before actual injuries or losses have occurred and there is a demonstration of adverse interests that necessitate the sharpening of the issues raised). The probate court's ruling effectively guided and directed the PRs' future conduct in relationship to distributing GRAT payments to the foundation, allowing them to do so without conditions.

We hold that the issue of priority was ripe for adjudication *for the limited purpose of resolving the dispute over conditions*, but not ripe for adjudication with respect to a definitive determination on tax apportionment and the abatement of bequests as reflected in the challenged order. Having set forth the rejection of conditions in the order, the order should not have proceeded to apportion speculative and unknown taxes, although it would have been permissible, yet unnecessary, to render a tentative tax priority decision linked and limited to the issue concerning conditions. Even if tax experts unanimously agreed that the analysis in determining the priority issue today would not be affected in any measure by a subsequent and final tax determination, the fact remains that the priority claims, for purposes of actual tax apportionment, are hypothetical and contingent on future events. This is so because, as argued in part by the PRs

below, the pour-over trust's residue could ultimately be sufficient to cover the transfer taxes and the priority issue would then need no resolution.

We also find some support for our ruling in MCL 700.3922(5), which provides as follows:

> On *petition of the person required to pay a tax*, the probate court having jurisdiction over the administration of a decedent's estate may determine the apportionment of the tax. If there are no probate proceedings, on the petition of a person required to pay a tax, the probate court of the county where the decedent was domiciled at death shall determine the apportionment of the tax. [Emphasis added.]

We conclude that the language "required to pay a tax" means that a tax has actually been assessed against a particular person, or that a will, a trust, the Internal Revenue Code (IRC), Title 26 of the United States Code, or EPIC calls for a certain person to pay a tax, with there being no dispute that some amount of tax will be due from the person even though the tax is yet to be assessed. Here, for purposes of MCL 700.3922(5), no tax has yet been assessed against appellant, the family trust, SBA beneficiaries, the GRATs, or the foundation, and the imposition of any such tax on these persons or entities in the future is entirely speculative. The probate court did not have before it a petition by a "person required to pay a tax." Accordingly, the court's definitive tax apportionment ruling was premature under MCL 700.3922(5). By restricting the application or context of the priority ruling to the issue regarding conditions and not actual tax apportionment, MCL 700.3922(5) is not implicated nor offended because it only pertains to "the apportionment of the tax."

We also note that the probate court's order not only placed the GRATs after the SBAs for purposes of paying transfer taxes, the order also made the GRATs "the last source of payment" for transfer taxes. This would put the assets in the ranch trust, assets which were also part of a specific devise under the will, ahead of the GRATs relative to satisfying tax liabilities. It was premature to reach such a holding, and no arguments were presented on the matter.

Finally, the complexity of the IRC, which we have studied as part of our underlying review of this appeal, along with the intricacies of EPIC on tax apportionment, MCL 700.3902, and the abatement of bequests, MCL 700.3920 to MCL 700.3923, beg a definitive tax priority ruling only after a final determination of taxes has been made and all of the tax ramifications are known.

We vacate that portion of the probate court's order that established tax priorities and remand for further proceedings consistent with this opinion. Given the procedural posture of this case and appellant's request, express or implicit, for a tax priority ruling, we decline to award appellant taxable costs under MCR 7.219(A). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan